



ICCL Position on

Provisions in the Twenty-Eighth

Amendment of the Constitution Bill

2007

Commentary on the proposed new sections on
strict/absolute liability and soft information

April 2007

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About the Irish Council for Civil Liberties (ICCL)

The Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone.

Founded in 1976 by Mary Robinson and others, ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. These have included establishing an independent Garda Síochána Ombudsman Commission, legalising the right to divorce, securing more effective protection of children's rights, decriminalising homosexuality and the introduction of enhanced equality legislation.

We believe in a society which protects and promotes human rights, justice and equality.

What we do:

- Advocate for positive changes in the area of human rights;
- Monitor government policy to make sure that it complies with international standards;
- Conduct original research and publish reports on issues as diverse as equal rights for all families, the right to privacy, police accountability and judicial accountability;
- Run campaigns to raise public and political awareness of human rights, justice and equality issues;
- Work closely with other key stakeholders in the human rights, justice and equality sectors.

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Introduction

On 30 January 2007, the Minister for Health and Children, Mr Brian Lenihan TD, circulated a first briefing document containing a number of propositions for wording to amend the Constitution in relation to children.¹ The Minister engaged in a round of face-to-face consultations on the basis of those propositions. A delegation from the Irish Council for Civil Liberties (ICCL) met privately with the Minister on 5 February 2007, during which it indicated that the ICCL was deeply disappointed that the propositions concerned were restricted to measures involving the protection of children. The ICCL's delegation emphasised that the propositions would not effectively embed children's rights in the Constitution.

On the following day, the ICCL's views were provided to the Minister in writing in the form of two position papers, one covering propositions 1-4 and the other proposition 5 (which raises different and distinct issues). Copies of those documents were also made available to opposition spokespersons, the Ombudsman for Children, the Children's Rights Alliance, and other interested parties.

On 9 February 2007, the Minister distributed a second briefing document on proposed constitutional amendment.² The ICCL drafted two additional papers in response.

Finally, on 16 February 2007, the Government introduced the Twenty-Eighth Amendment of the Constitution Bill 2007. The main purpose of this Bill is to insert a new section under Article 42 entitled 'Children' which includes five new sub-articles. In the present document, the ICCL comments on the fifth sub-article as it deals with different and distinct issues related to the criminal law. Sub-articles 1-4 are the subject of a separate ICCL paper.

¹ Minister for Children, Mr Brian Lenihan TD (6 February 2007) *Briefing Paper on Proposed Amendments for a Constitutional Referendum*. (Briefing Paper 1).

² Minister for Children, Mr Brian Lenihan TD (9 February 2007) *Briefing Paper on Proposed Amendments for Constitutional Referendum* (Briefing Paper 2).

Article 42(A): Provision 5.1^o

5.1^o Provision may be made by law for the collection and exchange of information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or other persons of such a class or classes as may be prescribed by law.

What will be the practical effect of sub-article 5.1^o?

This provision allows the Oireachtas to legislate for the collection and exchange of 'soft information' relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or persons of such class or classes as may be prescribed by law. The intention behind this proposed amendment is to allow state agencies to exchange 'hard information' and 'soft information' in relation to persons working with children and vulnerable adults as a protection measure. Hard information in this instance refers to prior convictions, unsuccessful convictions and pending cases which the Garda Vetting Service currently release.³ According to the Minister for Children, soft information refers to, for example: "a school seeking to recruit a teacher who has been investigated or even repeatedly questioned in connection with incidents of child sexual abuse, cannot be given this vital information because there has been no arrest".⁴

What difficulties does sub-article 5.1^o raise?

This provision has been included by the Government in response to a recommendation made by the Ferns Inquiry Report⁵ and approaches from child protection agencies, such as the Irish Society for the Prevention of Cruelty to Children (ISPCC) and Barnardos.⁶ Moreover, the Government was advised by the Attorney General that this amendment was necessary given existing fundamental protections in the Constitution.

³ Minister for Children, Mr Brian Lenihan (19.02.07) *Briefing Note on Proposed Amendment*, at p. 3 <http://www.omc.gov.ie/documents/legislation/Briefing-note-190207.doc> (third briefing paper)

⁴ *Ibid.*

⁵ The Ferns Inquiry Report catalogues an appalling and indefensible catalogue of sexual abuse perpetrated against children by clergy, and subsequent inaction by the diocesan authorities. The Report makes many recommendations concerning the protection of children which the ICCL is in complete agreement. See Ferns Inquiry (2005) *Ferns Inquiry Report*, Government Stationary Office.

⁶ *Ibid.*

Children and vulnerable people are entitled to expect the highest levels of protection against abuse. However, measures to protect children and adults from harm cannot be construed as absolutes overriding all other considerations. There is a need for balance and proportionality. It is absolutely essential that any future legislation in this area both protects children and vulnerable adults from sexual abuse/exploitation, while at the same time ensures that the rights of persons working with children are not violated due to unfounded allegations.⁷ These rights include the:

- Presumption of innocence⁸;
- Right to a fair trial⁹;
- Right to individual privacy¹⁰;
- Right to earn a livelihood;¹¹
- Right to a person's good name.¹²

Consequently, any legislation introduced should not only be consistent with the constitutional protection of these personal rights, but it also meet the relevant tests under the European Convention on Human Rights (ECHR),¹³ namely be legal; in response to a pressing social need; necessary in a democratic society; proportionate and non-discriminatory.

ICCL Recommendation

- In advance of the proposed referendum, the Government should publish legislative proposals or a Bill setting out the detailed arrangements and safeguards that will govern the sharing and exchange of soft information.
- The Government should extend the collection and exchange of soft information to include vulnerable groups of adults.

⁷ It is worth mentioning here that there are concerns about the UK's Criminal Records Bureau. According to media reports, there are a number of people who have been mistakenly listed as having convictions. See for example, BBC Online story 'Innocent people dubbed criminals' April 2004 <http://news.bbc.co.uk/1/hi/uk/3630971.stm> Refer to the UK Government site 'Every Child Matters' for further information on new vetting and barring procedures.

<http://www.everychildmatters.gov.uk/vettingandbarring/>

⁸ Article 38.1, Irish Constitution and Article 6(2), ECHR.

⁹ Article 38.1, Irish Constitution and Article 6(1), ECHR.

¹⁰ *McGee v Attorney General* [1974] IR 284; *Kennedy v Ireland* [1987] IR 587 and Article 8, ECHR.

¹¹ *Murtagh Properties v Cleary* [1972] IR 330; *Murphy v Stewart* [1973] IR 97.

¹² Article 40.1, Irish Constitution.

¹³ The ECHR was given further effect in Ireland through the ECHR Act 2003.

Article 42(A): Provision 5.2°

Following the judgment in the C.C. case, the Oireachtas enacted the Criminal Law (Sexual Offences) Act, 2006. The Act takes cognisance of the C.C. judgment by allowing a defendant to argue that he/she honestly believed the child had reached 15 years (Section 2(3)). However, the burden of proof is placed firmly on the accused and not on the prosecution to establish the existence, or otherwise, of an honest mistake (Section 2(3)).

The Joint Committee on Child Protection examined this new legislation and concluded that the defence of honest mistake should not be available to persons accused of an offence involving sexual activity with a child under 16 years. Legally, this will ensure that the mental element of the offence, that is, the accuser's state of mind (*mens rea*) is not in issue. In practice, such a move could be seen as desirable because cross-examination of children could be avoided where the physical element of the crime was established through other evidence.

The Government has included Provision 5.2° in response to the Joint's Committee's recommendation. It reads:

5. 2° No provision in this Constitution invalidates any law providing for offences of absolute or strict liability committed against or in connection with a child under 18 years of age.

What will be the practical effect of sub-article 5.2°?

The main effect of sub-article 5.2° is that legislation enacted by the Oireachtas imposing absolute or strict liability for sexual offences against persons under 18 years cannot be struck down as unconstitutional. With sub-article 5.2°, the Government is seeking to restore certain aspects of the law to its position prior to the C.C. case and eliminate the possibility of defendants pleading honest mistake, thus allowing the Oireachtas to make unlawful carnal knowledge an offence of absolute liability. However, in reality, this constitutional amendment goes much further as sub-article 5.2° permits the Oireachtas to enact any type of absolute/strict liability law in respect of persons aged up to 18 years. By contrast, Section 1(1) of the Criminal Law (Amendment) Act, 1935 specified that it was an offence for a person to have unlawful carnal knowledge of a girl under the age of 15. Moreover, the Joint Committee on Child Protection only recommended that the defence of honest mistake should not be available to persons involved in sexual activity with a child under 16 years.

What difficulties does sub-article 5.2° raise?

Many of the difficulties associated with sub-article 5.2° have already been identified by the Supreme Court in the *C.C.* case. In considering the constitutionality of this provision, the Supreme Court focused on the absolute nature of the offence and the fact that it fails to afford a defence no matter how extreme the circumstances.¹⁴ The Supreme Court made it clear that Section 1(1) is capable of criminalising and jailing the morally blameless. Conviction for such an offence carries a social stigma for the individual and their family and this is compounded if there is a requirement to register as a sexual offender.

The Supreme Court did consider the alternative view, that this provision is necessary to deter individuals from engaging in sexual activity with minors. However, the Court held that this could be achieved by legitimate means **without the manifest injustice of permitting conviction for a serious criminal offence in the absence of any requirement of mental guilt.** After considering jurisprudence from other jurisdictions on similar types of offences and the Supreme Court's decision in *Re: Employment Equality Bill*¹⁵, Hardiman J concluded:

I cannot regard a provision which criminalises and exposes to a maximum sentence of life imprisonment a person without mental guilt as respecting the liberty or the dignity of the individual or as meeting the obligation imposed on the State by Article 40.3.1 of the Constitution: "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life of person's good name and property rights of every citizen."¹⁶

On the question of whether sub-article 5.2° constitutes an attack on constitutional rights of the individual, the Minister for Children states in his briefing document accompanying the bill that it will not, and that accused persons will receive a fair trial in accordance with the law.¹⁷ The ICCL strongly disagrees with this assertion. The Supreme Court struck down this law in *C.C.* because it was capable of criminalising and jailing the morally innocent. How can an accused person still be given a fair trial when he/she can still be convicted and deprived of their liberty if they are morally blameless?

¹⁴ The Court cited *R v Prince* [1875] LR 2 CCR where the jury found that the girl in question appeared to be well over the relevant age of 16 years, had told the defendant believably that she was over 18 years and that this belief was reasonable on his behalf. However, no defence was permitted. The main issue with this is that it fails to take account of one of the basic principles underpinning criminal liability, *mens rea*, which refers to the guilty mind.

¹⁵ [1997] 2 IR 321.

¹⁶ *C.C. v Ireland & ors* [2006] IESC 33, at p.19-20

¹⁷ Minister for Children, Mr Brian Lenihan TD, (19 February 2007), *ibid*, at p. 4.

Further, the ICCL is concerned about the impact of strict and absolute liability offences on children and older teenagers. This issue has been acknowledged by child law expert and Special Rapporteur on Child Protection, Mr Geoffrey Shannon in the following terms:

Even if the interests of the child were to be regarded by the courts, an argument could be made that the strict liability regime itself actually offends against the rights of any accused who is also a child. It is arguable that children, by virtue of their greater exposure to, and interaction with fellow children, are more likely to be at risk of unwittingly engaging in sexual intercourse with a girl under the age of 15. A strict liability regime therefore would criminalise those children who have consensual sexual intercourse with other children. A simple constitutional insistence on the supremacy of the rights of the child would thus not automatically provide a solution to the C.C. situation.¹⁸

In reaching its decision, the Supreme Court in C.C. noted that the Law Reform Commission in 1990 had recommended that a defence of honest mistake “genuinely believed” on “reasonable grounds” should be available to a defendant, except in the case of a person in authority over a minor.¹⁹ The ICCL agrees with this recommendation. It is also worth mentioning that the **Irish Centre for Human Rights**, NUI Galway, made a similar recommendation to the Joint Committee on Child Protection.²⁰

¹⁸ Shannon, G. (September 2006) *Submission to the Joint Committee on Child Protection*, at p. 12-13.

¹⁹ Refer to Law Reform Commission (1990) *Report on Child Sex Abuse*, Law Reform Commission: Dublin. www.lawreform.ie

²⁰ “Defendants should be provided with all means necessary to secure a fair trial, including defences for non-regulatory offences. In cases of consensual sexual activity with minors below the age of consent, the accused should be able to raise a defence of reasonable belief as to the age of the child. Statutory provisions may, however, be used to limit this defence to non-authoritative figures, and persons who took all reasonable precautions to determine the age of the complainant. When drafting the defence, the Oireachtas should also implement protections for the child, particularly in the types and use of evidence during trial. It is important that a child not lose his/her legal protection due to his/her physical maturity.” See the Irish Human Rights Centre (18 August 2006) *Submission to the Joint Committee on Child Protection*, available at http://www.nuigalway.ie/human_rights/Docs/Publications/ICHR%20-%20Child%20Protection%20Submission.doc

In addition, the proposed amendment does not just restore the law to its status prior to the judgment in the *C.C.* case. The proposed amendment provides the Oireachtas with a broad power to impose strict and absolute liability for any offences against children. The justification for this proposal is provided by the Minister for Children:

The Government does not want to limit the power of the Oireachtas to legislate in this area. There may well be situations where, in the future, the Oireachtas may wish to provide absolute protection to children, especially very young children. There are no plans to introduce such legislation at present but it would be wise to permit the Oireachtas discretion in this matter in the future [author's own emphasis].²¹

The ICCL respectfully disagrees with this point and questions the need to introduce such a radical change to the criminal law in relation to non-regulatory offences.²² Given that the provision 5.3^o also deals with strict and absolute liability, the ICCL's position on this issue is the next section.

Lastly, in the Minister for Children's briefing document he notes that since the *C.C.* case, the number of "complaints about underage sex offences" received by the Director of Public Prosecutions (DPP) has fallen.²³ This point seems to be made as a justification for sub-article 5.2^o. However, in reality it is unclear why there has been a reduction in complaints about underage sex. The ICCL would expect at the very least that the Government should commission independent research to assess why there has been a reduction in complaints before proposing such a major change to the Constitution.

²¹ Minister for Children, Mr Brian Lenihan TD, (19 February 2007), *ibid*, at p. 4.

²² The distinction between regulatory and non-regulatory offences is dealt with in the following section.

²³ Minister for Children, *ibid*.

ICCL Recommendation

As stated above, the ICCL believes that sub-article 5.2° should be redrafted. However, the ICCL considers it acceptable to legislate for absolute liability offences against persons who are in authority over children, given that they are in a position to know the age of the child or young person in their charge.

Like the Joint Committee on Child Protection, the ICCL is concerned about the effect of cross-examination of young people. It is the view of the ICCL that a failure to adopt a child-centred approach in criminal justice proceedings and the nature of the adversarial system of justice, are the main reasons why criminal procedures are potentially traumatising for young people. The ICCL therefore supports many of the Joint Committee's recommendations on the criminal investigation phase and on adapting the criminal justice process to protect the welfare of children. The ICCL considers that the Criminal Evidence Act, 1992 should be amended to include additional provisions such as the possibility of a court appointing a commissioner to take evidence from vulnerable child witnesses.²⁴

Further, the Joint Committee recommended that:

[...] subject to the necessary resources and facilities being put in place... consideration should be given to amending the Criminal Evidence Act, 1992 so as to ensure that at least some special protection measures for witnesses be automatically applied to all child complainants [...].²⁵

The ICCL is surprised that the Joint Committee qualified its recommendation based on resources. **If the State is truly committed to providing absolute protection to young people in sex abuse cases, then protections in criminal justice proceedings must be mandatory.** In practice, this would mean that the Government would have to prioritise resources to protect the welfare of child complainants and witnesses in criminal justice proceedings. It is important to remember that Proposition 5 will only protect a certain cohort of children from cross-examination. The ICCL is concerned that if these measures are not made mandatory, other children will still be forced to undergo a traumatising experience.

²⁴ A similar provision exists in Scotland, refer to Section 271I of the Vulnerable Witnesses (Scotland) Act, 2004. In practice, the commissioner is videotaped taking evidence from child witnesses.

²⁵ Joint Committee on Child Protection, *ibid*, at p. 71.

Article 42(A): Provision 5.3°

3° The provisions of this section of this Article do no, in any way, limit powers of the Oireachtas to provide by law for other offences of absolute or strict liability.

What will be the practical effect of sub-article 5.3°?

The practical effect of sub-article 5.3° is that it provides the Oireachtas with an unlimited power to dispense with *mens rea* and introduce strict/absolute liability for any type of offences.

What difficulties does sub-article 5.3° raise?

The ICCL is seriously concerned that the Government is proposing to amend the Constitution to allow the Oireachtas to introduce offences of absolute or strict liability. In the common law legal system, criminal liability is determined by two factors: (1) *actus rea*, often referred to as the external elements of a crime or the guilty act and (2) *mens rea*, typically referred to as the internal elements of a crime or the state of mind of the accused. With strict liability offences, liability is imposed “without necessity of proving *men rea* with respect to one or more of the elements of the crime”.²⁶ According to McAuley and McCutcheon, in medieval times “strict liability was the natural order of things” and culpability played little part in the common law.²⁷ “Guilt was established on proof that the accused had caused, often in no more than a minimal sense, the harm in question”.²⁸ However, overtime *men rea* became firmly established as a common law rule with the result that offences of strict liability are now the exception and are generally restricted to regulatory offences. For example, crimes of strict liability are often created by statute to control or regulate daily activities such as the production and marketing of food or offences relating to road traffic.²⁹ The penalty for these crimes is usually a fine.

²⁶ Oxford Dictionary of Law (2006) *Dictionary of Law*, Oxford University Press, at p. 516.

²⁷ McAuley, F. and McCutcheon, P. (2000) *Criminal Liability*, Roundhall: Dublin, at p. 313.

²⁸ *Ibid.*

²⁹ Oxford Dictionary of Law (2006), *ibid.*

In the case of Ireland, this general category of offences is often called “public welfare offences” and has received widespread judicial endorsement.³⁰ In *Maguire v Shannon Regional Fisheries Board*³¹, Lynch J’s dicta limited offences of strict liability to three types of cases: (1) acts which are not criminal in any real sense but which in the public interest are prohibited under a penalty; (2) public nuisances and (3) cases which, although criminal in form are really only a method of enforcing a civil entitlement.

Prior to the *C.C.* case, the offence of unlawful carnal knowledge with a girl under the age of 15, which was an offence of strict/absolute liability as it did not allow for the defence of honest mistake, was the only offence of its kind attracting a penalty of up to life imprisonment.³² As discussed in the previous section, the Supreme Court in *C.C.* deemed this offence to be unconstitutional given its capacity to criminalise the “mentally innocent” and deprive them of their liberty. Here the Supreme Court’s judgment is in line with Canadian jurisprudence. In the *BC Motor Vehicle Reference*³³ the court ruled that strict/absolute liability resulting in imprisonment was a violation of the right not to be deprived of liberty save in accordance with the principles of fundamental justice as protected by Section 7 of the Canadian Charter of Rights of Freedoms.

In *C.C.*, the Supreme Court also struck down the offence as it carried a serious social stigma for the accused and their family members. Again, the Supreme Court followed the House of Lords in *Sweet v Parsley*³⁴. In this case, the defendant was a landlady convicted under Section 5 of the Dangerous Drugs Act 1965, of “being concerned in the management of premises used for the smoking of cannabis”. She appealed alleging that she had no knowledge of the circumstances as she only visited the premises to collect the rent. The House of Lords quashed her conviction and held that it had to be proved that the defendant had intended the house to be used for drug-taking. Lord Reid also noted the stigma attached to the conviction and stated that: “a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma”.

³⁰ McAuley, F. and McCutcheon, P. (2000), *ibid.*

³¹ [1994] 3 IR 580 unreported.

³² One of the only exceptions here appears to be the 1994 Public Order offences of riot (Section 14) and violent disorder (Section 15) which attract up to a penalty of ten years imprisonment. Taking account of the Supreme Court’s decision in *C.C.*, Dr Claire Hamilton believes that the courts would be likely to declare these sections unconstitutional. Refer to Hamilton, C. (2007) *The Presumption of Innocence and Irish Criminal Law – Whittling the Golden Thread*, Irish Academic Press: Dublin, at p. 89.

³³ (1985) 48 CR (3d) 289.

³⁴ [1970] AC 132.

Recognising that strict and absolute liability for non-regulatory offences can lead to wrongful censure and a lifelong stigma of being a criminal, the question arises as to why the Government wants an unrestricted power to introduce it to the criminal law? The Minister for Children in his briefing note only refers to sub-article 5 which relates specifically to children (see above). Therefore, it is extremely unclear why this proposed amendment is being put to the people.

The ICCL believes that there may be two reasons why the Government is keen to amend the Constitution on this matter. There is no doubt that strict/absolute liability makes it easier for the Director of Public Prosecutions (DPP) to prosecute as there is no obligation to prove criminal intent. Moreover, it would make the criminal justice process cheaper to run as strict/absolute liability cases are generally shorter. However, these supposed benefits need to be weighed against the potential for gross violations of people's rights. Constitutions are designed to protect ordinary citizens against the excesses of state interference and not provide for them.

It is the view of the ICCL that sub-article 5.3° should be deleted. No case has been advanced for its inclusion in the referendum bill. Should sub-article 5.3° become part of the Constitution, it has the potential to radically alter the nature of the criminal justice system detrimentally and the State's relationship with its own citizens.

ICCL Recommendation

- Delete.